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**AN ANALYSIS OF THE EFFECT OF THE AMENDMENTS TO
THE TAXATION OF FOREIGN NON-SOUTH AFRICAN
EMPLOYMENT INCOME**

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by

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<u>CHAPTERS</u>	Page
1. <u>BACKGROUND</u>	4
2. <u>SECTION 10(1)(o)(ii) EXEMPTION</u>	7
3. <u>SECTION 10(1)(o)(ii) AMENDMENT</u>	13
4. <u>SECTION 6quat</u>	17
5. <u>DOUBLE TAXATION AGREEMENTS</u>	20
6. <u>TAX RESIDENCY</u>	27
7. <u>CONCLUSION</u>	32

CHAPTER ONE: BACKGROUND

As per the Explanatory Memorandum on the Taxation Laws Amendment Bill of 2017 dated 15th December 2017¹, the South African Parliament (hereinafter referred to as “Parliament”) has amended the Income Tax Act No.58 of 1962² (hereinafter referred to as “IT Act”) with new, revised and repealed provisions. As from the 1st of March 2020, Parliament has amended section 10(1)(o)(ii) of the IT Act. The section is amended so that foreign employment income should not be fully exempt in the hands of a resident³. Section 10(1)(o)(ii) of the IT Act currently exempts in full, the foreign employment income derived by a resident subject to certain requirements as per the section. The amendment seeks to exempt the first one million rand (R1m) of a residents’ employment income earned outside of the Republic⁴. Foreign employment income in excess of R1m will be taxed in the Republic, applying the normal tax tables for that particular year of assessment⁵. All other requirements of section 10(1)(o)(ii) will not be affected by the amendment, therefore residents will still be required to fulfil the other requirements of the section such as to spend more than 183 and at least 60 continuous full days⁶ outside of the Republic rendering employment services during any 12-month period in order to qualify for the exemption.

The amendment ensures that relief is offered to middle- and lower-income earners who are residents working outside of the Republic.⁷. The effect of the amendment would be that all residents who now derived more than R1m foreign employment income and previously applied the benefits of the section

¹ Explanatory Memorandum on the Taxation Laws Amendment Bill, 2017, 15 December 2017, point 1.2, page 6, available at <http://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2017-01%20-%20Explanatory%20Memorandum%20on%20the%202017%20Taxation%20Laws%20Amendment%20Bill%2015%20December%202017.pdf>, accessed on 04 January 2019.

² Income Tax Act No 58 of 1962, available at <http://sars.mylexisnexis.co.za/#>, accessed on 04 January 2019.

³ As defined in section 1(1) of the IT Act

⁴ As defined in section 1(1) of the IT Act

⁵ As defined in section 1(1) of the IT Act

⁶ A “full day” means 24 hours (from 0h00 to 24h00)

⁷ Explanatory Memorandum on the Taxation Laws Amendment Bill, 2017, 15 December 2017, point 1.2, page 8, available at <http://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2017-01%20-%20Explanatory%20Memorandum%20on%20the%202017%20Taxation%20Laws%20Amendment%20Bill%2015%20December%202017.pdf>, accessed on 05 February 2019..

10(1)(o)(ii) exemption will now have to seek tax relief elsewhere under the IT Act, such as section 6quat of the IT Act which is a credit for taxes.

When South Africa moved from a source based⁸ to a residence based⁹ system of taxation on 1 March 2001, all South African residents were now being subject to tax on their world-wide income. Residents working outside the Republic were then at risk of being taxed twice¹⁰ on the employment income derived because of South Africa's residence basis system of taxation. The section 10(1)(o)(ii) exemption was the relief mechanism for residents to prevent the possibility of double taxation on the employment income derived from working outside the Republic.

The primary reason for the amendment of section 10(1)(o)(ii) is to prevent situations where employment income is neither taxed in the foreign country nor in South Africa, i.e. double non-taxation, or where foreign taxes are imposed at a significantly reduced rate on employment income derived from working outside the Republic.¹¹

When South Africa moved to a residence base system of taxation on 1 March 2001 there was a need to align its tax practices to that of internationally accepted tax practices. The residence base tax system taxes residents on their worldwide income, even where residents are working outside the Republic. Some foreign countries offered their taxpayers a tax exemption for income derived from a foreign source, provided certain requirements were met. For example, an Australian tax resident who is engaged in continuous foreign service as an employee for 91 days or more and the foreign service is directly attributable to specific services¹², then the foreign employment

⁸ Residents taxed on South African sourced income

⁹ Residents taxed on world-wide income

¹⁰ Taxed by South Africa and a foreign country.

¹¹ Explanatory Memorandum on the Taxation Laws Amendment Bill, 2017, 15 December 2017, Reasons for change, page 7, available at <http://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2017-01%20-%20Explanatory%20Memorandum%20on%20the%202017%20Taxation%20Laws%20Amendment%20Bill%2015%20December%202017.pdf>, accessed on 04 January 2019.

¹² Foreign service must be directly attributable to specific activities as listed, available at <https://www.ato.gov.au/Individuals/International-tax-for-individuals/In-detail/Foreign-income-of-Australian-residents/Exempt-foreign-employment-income/?anchor=Foreignincomeexemptfromtax#Foreignincomeexemptfromtax>, accessed on 04 January 2019.

income will be exempt from tax.¹³ This Australian tax practice (as well as various other countries) eliminates the possibility of double taxation on the same income provided certain requirements are met as per Australia's tax laws. South Africa therefore adopted the same international tax practice by implementing the section 10(1)(o)(ii) exemption which seeks out to also eliminate double taxation on the same income.

The amendment of section 10(1)(o)(ii) exemption will negatively affect a resident earning in excess of R1m and working in a tax free or low tax jurisdiction. There are a few alternatives available to affected¹⁴ residents working outside the Republic such as:

1. Seek relief via section 6quat of the IT Act, which is a tax credit on foreign taxes paid.
2. Apply the relevant Articles of a Double Taxation Agreement (hereinafter referred to as "DTA") between South Africa and a source country in order to seek relief for juridical double taxation.
3. Immigrate and become a non-resident, which will trigger a deemed disposal for capital gains tax purposes in terms of section 9H(2) of the IT Act.

My dissertation question is to essentially provide affected residents with alternatives to possibly reduce their South African normal tax liability when the section 10(1)(o)(ii) amendment takes effect on 1 March 2020.

The structure of my dissertation will therefore be as follows:

1. Explain the current treatment of the section 10(1)(o)(ii) exemption.
2. Explain the amended section 10(1)(o)(ii) exemption including the implications for residents.
3. Provide residents with alternatives to possibly reduce their normal tax liability.

¹³ Australian Government Taxation Office, Exempt Foreign Employment Income for Australian residents, available at <https://www.ato.gov.au/Individuals/International-tax-for-individuals/In-detail/Foreign-income-of-Australian-residents/Exempt-foreign-employment-income/?anchor=Foreignincomeexemptfromtax#Foreignincomeexemptfromtax>, accessed on 04 January 2019.

¹⁴ Earning in excess of one million rand foreign employment income derived outside of the Republic

CHAPTER TWO: SECTION 10(1)(o)(ii) EXEMPTION

Section 10(1)(o)(ii) of the IT Act exempts foreign remuneration in respect of services rendered outside of the Republic during any 12-month period.

Therefore, remuneration earned inside the Republic cannot be considered for an exemption under section 10(1)(o)(ii). Where remuneration is earned both inside and outside the Republic, the remuneration must be apportioned so that only the income relating to foreign services is exempt.

In order for a resident to qualify¹⁵ for the exemption, the resident must:

- earn certain types of remuneration;
- in respect of services rendered by way of employment;
- outside the Republic;¹⁶
- during specified qualifying periods; and
- not be subject to an exclusion.

The starting point to qualify for the exemption is that there must be an employment relationship whereby an employee is rendering services for any employer¹⁷ under a contract of employment. Without an employee-employer relationship, a resident will not be able to exempt its remuneration earned outside the Republic. The exemption will therefore not apply where a resident is outside the Republic and is not employed. The application of section 10(1)(o)(ii) relies on the fact that there must be an employee-employer relationship as the contract of employment is the important document for the South African Revenue Service (hereinafter referred to as “SARS”) to verify the validity of the residents’ section 10(1)(o)(ii) exemption. As a mandatory requirement, SARS Audit division will always request a contract of employment (amongst additional requests for other documentation) when auditing a section 10(1)(o)(ii) exemption in order to verify if the resident is indeed employed and rendering a service outside the Republic. Without a

¹⁵ INTERPRETATION NOTE: NO. 16, point 4.1, page 2, available at <http://www.sars.gov.za/AllDocs/LegalDoclib/Notes/LAPD-IntR-IN-2012-16%20-%20Exemption%20Foreign%20Employment%20Income.pdf>, accessed on 04 January 2019.

¹⁶ Landmass of South Africa as well as its territorial waters, which is a belt of sea adjacent to the landmass but not exceeding 12 nautical miles (roughly 22,2 km) beyond the baselines of the country

¹⁷ The term “any employer” means that services rendered to resident or non-resident employers could qualify for exemption.

valid contract of employment, the SARS Audit division will disallow any section 10(1)(o)(ii) exemption claims by the resident. The resident will also be unsuccessful when objection or appealing to the disallowance of a section 10(1)(o)(ii) exemption without a valid contract of employment.

The next step is to determine the type of remuneration earned as not all remuneration qualifies for the exemption. In general, qualifying remuneration¹⁸ includes salary, leave pay, wage, overtime pay, bonus, gratuity, commission, fee, emolument or allowance, for services rendered. The most general types of services rendered outside the Republic are in tax free or low tax foreign jurisdictions in various industries such as construction, aviation, information technology, etc. Obscure services rendered are where taxpayers are out on sea rendering services on a cruise ship, oil rig or patrol boats operating at the edge of the South African borders. These services on sea requires the vessel destination log, job designation of the resident and the reasons why the vessel is out at sea. The exemption requirements for these residents are contained in section 10(1)(o)(i), which is not discussed in this dissertation. However, where these residents are denied a section 10(1)(o)(i) exemption, they may apply the provisions of section 10(1)(o)(ii) to obtain the exemption, provided all the applicable requirements are met to claim a valid section 10(1)(o)(ii) exemption.¹⁹

The remuneration must be earned in respect of services outside of the Republic. There must be a service rendered in terms of a contract of employment.²⁰ Amounts paid to an employee other than for services rendered are not included in the scope of the exemption, such as payments for the relinquishment, termination, loss, repudiation, cancellation or variation of any office or employment or of any appointment (or right to be appointed)

¹⁸ Included are amounts contemplated in paragraph (i) of the definition of “gross income” in section 1(1) of the IT Act are also included, as too are amounts referred to in sections 8, 8B or 8C of the IT Act.

¹⁹ INTERPRETATION NOTE: NO. 34 (Issue 2), available at <http://www.sars.gov.za/AllDocs/LegalDoclib/Notes/LAPD-IntR-IN-2012-34%20-%20Exemption%20Remuneration%20Officer%20Crew%20Member%20Ship.pdf>, accessed on 05 February 2019.

²⁰ INTERPRETATION NOTE: NO. 16, point 4.1.3, page 3, available at <http://www.sars.gov.za/AllDocs/LegalDoclib/Notes/LAPD-IntR-IN-2012-16%20-%20Exemption%20Foreign%20Employment%20Income.pdf>, accessed on 04 January 2019.

to an office or employment²¹ are received by virtue of such termination, loss, repudiation, cancellation or variation, not in respect of services rendered, which are accordingly not exempt under section 10(1)(o)(ii). Remuneration received or accrued in respect of services rendered within the Republic remains subject to tax in South Africa. Where remuneration is earned for services rendered within and outside of the Republic, the resident must apportion the remuneration in order to determine the portion of remuneration relating to services rendered outside the Republic, which will be exempt. The SARS accepts the following method to calculate the exempt portion of remuneration as per Interpretation Note 16 (hereinafter referred to as “IN16”):

$$\frac{\text{Work days outside the Republic for the period}}{\text{Total work days for the period}} \times \text{Remuneration received during the period} = \text{Exempt portion of remuneration}$$

SARS interpretation notes is now settled law that Courts should not have regard to SARS interpretation notes when interpreting legislation, but may have regard to interpretation notes where the practice of SARS is evidenced by an interpretation note which has been recognised by SARS and the taxpayer.²² SARS Risk and Audit divisions rely on interpretation notes when risk profiling or auditing taxpayers and it has become a practice prevailing in SARS to rely on interpretation notes issued.

The exemption can only be applied during specified qualifying periods. The resident must render the services to his employer for more than 183 full days during any 12-month period²³. The 183 full days²⁴ does not have to be

²¹ That is, amounts contemplated in paragraph (d)(i) of the definition of “gross income” in section 1(1).

²² Status of SARS interpretation notes, available at <https://www.cliffedekkerhofmeyr.com/en/news/publications/2018/Tax/tax-alert-4-may-status-of-sars-interpretation-notes-.html>, accessed on 2019-02-06.

²³ Under dictionary meanings, a calendar month could mean either one of the twelve named portions into which a calendar year is divided, or it could mean a period of time which is calculated from a date in one month to the same date in a successive month. The period of 12 months referred to in section 10(1)(o)(ii) must therefore be given the more extended meaning and does not need to commence on the first day of a named calendar month or end on the last day of a named calendar month.

consecutive but over any 12-month period the 183 days must be exceeded²⁵. In addition to the 183 full days requirement, the resident must also have rendered services outside the Republic for a continuous period exceeding 60 full days over the same period of any 12-months. Therefore, the exceeding of 183 full days does not have to be continuous but the exceeding of the 60 full days must be a continuous period.

There is currently a practice whereby residents will remain outside the Republic when on annual leave in order to meet the “days” requirement as discussed above. Instead of coming home, say for Christmas holidays, residents will remain in the foreign country and in many instances the family will meet the resident during his/her annual leave vacation. One could easily jump to a conclusion that these days surely cannot be used as days outside the Republic but IN16 looks at a situation where a person is employed under a contract of employment which usually includes paid day off benefits such as annual or sick leave. Therefore, as per the contract of employment when the resident uses its annual leave, sick leave, family leave, etc., these days can be used by the resident to calculate the “days test” requirement only if the resident was outside of the Republic. It is SARS practice to allow employment benefits such as annual leave as a fulfilment of the “days test” requirement. SARS as an institution also does not go against its own interpretation notes issued even though there is an element of abuse by residents when calculating the “days test” requirement. In my opinion SARS should re-look at the “days test” requirement as the only reason why residents do not return to the Republic during annual leave is to meet the “days test” requirement in order to exempt their foreign income earned.

In addition, sometimes employees are employed on a contractual basis over certain periods in a year. The broken periods where the resident is unemployed and not in a contractual employment agreement but physically remains outside the Republic, these days cannot be used in determining the exemption as the resident is unemployed and the exemption only applies to

²⁴ Calendar days including weekends, public holidays, annual leave days, sick leave days and rest periods (as required under the specific terms of a contract of employment) that are spent outside the Republic are taken into account for purposes of calculating the period or periods outside the Republic.

²⁵ Any amount of time in excess of 183 full days, such as a few hours, will be sufficient.

residents who are employed. On the other hand, there could be residents who have mandatory rest periods as per their contract of employment, these rest period days can be used in the “days test” as being outside the Republic, provided that the resident remains outside the Republic. Only qualifying days outside the Republic can be used in the “days test”. Where a resident is in transit between two places such as the point of departure and the point of entry of a Country, these days are considered to be days outside the Republic.²⁶ Residents expressly excluded from the exemption are public office holders²⁷ and public service employees.²⁸

The takeaway under the current section 10(1)(o)(ii) exemption is that a resident who is in employment and earns remuneration for services to be rendered outside the Republic, can possibly exempt the remuneration from being taxed by the South African government provided the exemption requirements of section 10(1)(o)(ii) is met. If the exemption requirements are met then the resident will not be liable for taxation in South Africa, but could still be liable for taxation in the foreign country.

South Africa’s tax system models both the capital export neutrality (hereinafter referred to as “CEN”) and capital import neutrality (hereinafter referred to as “CIN”) principles. Richard Musgrave has been credited as being the first to distinguish between capital export neutrality and capital import neutrality.²⁹ The principle of CEN is based on the premise that residents should not incur a lesser tax burden by choosing to conduct activity abroad than they would if they invested at home. The typical design feature of a tax system based on CEN is taxation of all of a resident’s income, regardless of source, but with a credit (not to exceed the residence-based taxes otherwise payable on the foreign source income) for taxes that the resident pays elsewhere on a source basis, as per section 6quat of the IT Act. By contrast the typical design feature of a tax system based on CIN is a territorial approach to taxing income, which exempts foreign source income from a residence-based tax as per section 10(1)(o)(ii) of the IT Act.

²⁶ Proviso (A) to section 10(1)(o)(ii).

²⁷ Section 9(2)(g) of the IT Act

²⁸ Proviso (B) to section 10(1)(o)(ii).

²⁹ E-commerce and Source-based Income Taxation by Dale Pinto.

CHAPTER THREE: SECTION 10(1)(o)(ii) AMENDMENT

The South African Parliament first wanted to amend the section 10(1)(o)(ii) exemption commencing on 1st March 2019 by repealing the exemption in its entirety as per the Draft Explanatory Memorandum on the Taxation Laws Amendment Bill of 2017 dated 19th July 2017.³⁰ Residents would therefore be subject to tax on employment income for services rendered outside the Republic as opposed to before when the employment income could be fully exempt from taxation in South Africa. In cases where foreign taxes are paid, the resident could get relief under section 6quat³¹ of the IT Act, provided that all the relevant requirements are met. This proposed amendment would affect residents more negatively where the services rendered are in a tax-free country such as the United Arab Emirates (hereinafter referred to as “UAE”), because now for the first time the resident will have a South African “normal tax”³² liability.

Currently residents who work in UAE are earning remuneration for their services rendered which are free from being taxed by the UAE. These residents will then seek the section 10(1)(o)(ii) exemption so that their remuneration will be free from tax in South Africa, effectively placing these residents in a tax-free situation, by Law. In this regard the CIN principle is being used which exempt foreign source income from residence base taxation under section 10(1)(o)(ii) of the IT Act. Conversely residents who pays foreign taxes like in the United States of America (hereinafter referred to as “USA”) will seek relief from South African tax via the section 10(1)(o)(ii) exemption and this will allow these residents not to be double taxed.

The draft proposed amendment to repeal the section 10(1)(o)(ii) exemption will place many residents working outside the Republic in a situation where they must pay South African taxation on their remuneration earned. The resident working in the UAE who always enjoyed a tax-free benefit will now

³⁰ Explanatory Memorandum on the Taxation Laws Amendment Bill of 2017, dated 19 July 2017, available at <http://www.treasury.gov.za/public%20comments/TLAB%20and%20TALAB%202017%20Draft/2017%20Draft%20Explanatory%20Memorandum%20on%20the%202017%20draft%20TLAB%20-%202019%20July%202017.pdf>, accessed on 04 January 2019.

³¹ Relieve from double taxation

³² As defined in section 1(1) of the IT Act

be liable for South African taxation. The resident in the USA will now be double taxed by both the USA and South Africa and would have to seek relief via section 6quat of the IT Act. The draft proposed amendment is in line with the CEN principle to allow a credit on foreign taxes via section 6quat of the IT Act.

National treasury³³ then engaged stakeholders in an extensive consultation process and then the Final Explanatory Memorandum on the Taxation Laws Amendment Bill of 2017 dated 15th December 2017, was amended where section 10(1)(o)(ii) will not be repealed in its entirety but will allow the first R1m of remuneration earned in respect of a year of assessment to be exempt from tax in South Africa as of 1 March 2020, provided the resident meets all the requirements of the section 10(1)(o)(ii) exemption. There were various comments raised by stakeholders and addressed by National treasury during the consultation process, some which are as follows:³⁴

- One of the comments received was that the cost of living in foreign countries is higher than in South Africa, and should be taken into account in the design of the tax.
- Residency was also a big discussion point with views expressed that the amendment would lead to accelerated formal emigration from South Africa or breaking of residency.
- Another comment received was that the amendment will result in cash flow problems as the foreign tax credit (s6quat) can only be claimed on assessment.

National Treasury explained that the current section 10(1)(o)(ii) exemption is to prevent double taxation of a resident's remuneration between South Africa and the foreign country where the employment services are rendered. The

³³ The National Treasury is responsible for coordinating macroeconomic policy and promoting the national fiscal policy framework. Its role is defined by the Constitution of the Republic of South Africa and in the Public Finance Management Act. The National Treasury coordinates intergovernmental financial relations, manages the budget preparation process and exercises control over the implementation of the annual national budget, including any adjustments budgets. The National Treasury also performs functions assigned to it in other legislation.

³⁴ Amendment in respect of foreign employment income exemption, available at <http://www.sataxguide.co.za/amendment-in-respect-of-foreign-employment-income-exemption/>, accessed on 2019-02-06.

exemption instead creates an opportunity for double non-taxation where foreign countries are tax free (example, the UAE) and this is contrary to the purpose of the foreign employment income tax exemption when first introduced. In the Explanatory Memorandum on the Revenue Laws Amendment Bill in 2000³⁵, it was noted that the section 10(1)(o) relief measure will be monitored to determine whether certain categories of residents abuse it to earn foreign employment income without foreign taxation. Fast forward to the Explanatory Memorandum on the Taxation Laws Amendment Bill of 2017 dated 15th December 2017; National Treasury is making the proposed amendment possibly based on what National Treasury deems an abuse by residents benefiting from double non-taxation. In addition, the Davis Tax Committee Secretariat Closing Report on 29th March 2018 recommended that section 10(1)(o)(ii) of the IT Act be reviewed as the section appeared to be eroding the tax base of South Africa and therefore concerns were raised by the Committee.³⁶

One aspect that the proposed amendment failed to take into account was the unequal tax treatment between South African residents employed by a national, provincial or local sphere of government or any public or municipal entity as compared to South African residents employed by the private sector. Public sector employees do not qualify for the exemption in respect of foreign employment income, whereas employees in the private sector do qualify for the income tax exemption in respect of foreign employment income in terms of section 10(1)(o)(ii)(B) of the IT Act.³⁷ The Draft Explanatory Memorandum on the Taxation Laws Amendment Bill of 2017 dated 19th July 2017, clearly had intention to correct this unequal tax position by repealing the exemption in full so that public and private sector employees

³⁵ Explanatory Memorandum on the Revenue Laws Amendment Bill, 2000, available at http://www.treasury.gov.za/legislation/bills/2000/rlam_memo.pdf, accessed on 04 January 2019.

³⁶ CLOSING REPORT ON THE WORK DONE BY THE DAVIS TAX COMMITTEE, point 3.3, page 7, available at [http://www.taxcom.org.za/docs/20180329%20DTC%20Closing%20Report\(2\).pdf](http://www.taxcom.org.za/docs/20180329%20DTC%20Closing%20Report(2).pdf), accessed on 04 January 2019.

³⁷ INTERPRETATION NOTE: NO. 16, point 4.1.6, page 8, available at <http://www.sars.gov.za/AllDocs/LegalDoclib/Notes/LAPD-IntR-IN-2012-16%20-%20Exemption%20Foreign%20Employment%20Income.pdf>, accessed on 06 February 2019.

are treated equal, but the correction was not part of the Final Explanatory Memorandum on the Taxation Laws Amendment Bill of 2017 dated 15th December 2017.

CHAPTER FOUR: SECTION 6quat

The rebate or deduction on foreign taxes is found under section 6quat³⁸ of the IT Act and is supported by Interpretation Note 18³⁹ (hereinafter referred to as “IN18”) dated 26 June 2015. South Africa taxes its residents on their world-wide income. A resident deriving income from a foreign source could be taxed in the source country as well as in the Republic, which will lead to juridical double taxation⁴⁰. International juridical double taxation is the imposition of similar taxes by two or more sovereign countries on the same item of income (including capital gains) of the same person. In many instances either a tax treaty or domestic law provides relief from international juridical double taxation (including South Africa) also provide unilateral tax relief in their domestic law.

South Africa provides relief to its residents from double taxation in its domestic law via section 6quat of the IT Act. In terms of the proposed section 10(1)(o)(ii) amendment, residents who earns in excess of R1m for services rendered outside the Republic will be in a juridical double tax position (except in a tax-free jurisdiction). Section 6quat will be the primary mechanism used to provide relief for foreign taxes to residents whose taxable income⁴¹ includes income from a foreign source.

Currently residents who earns remuneration from services rendered outside the Republic and meets the requirements of the section 10(1)(o)(ii) exemption will be able to exempt their foreign sourced income. The resident could still be liable for taxation in the foreign country depending on that country’s tax laws. As from 1 March 2020, section 10(1)(o)(ii) will allow only the first R1m to be free from tax and any remuneration earned over and above the R1m will be taxed in South Africa applying the tax tables for that

³⁸ Section 6quat(3), (4) & (5) will not be discussed as it’s beyond the scope of this dissertation.

³⁹ Interpretation Note 18, available at <http://www.sars.gov.za/AllDocs/LegalDoclib/Notes/LAPD-IntR-IN-2012-18%20-%20Rebate%20Deduction%20Foreign%20Taxes%20Income.pdf>, accessed on 04 January 2019.

⁴⁰ Definition of Juridical Double Taxation, available at <http://www.oecd.org/ctp/glossaryoftaxterms.htm>, accessed on 06 February 2019.

⁴¹ As defined in section 1(1) of the IT Act

particular year of assessment.⁴² Depending how much income a resident is earning will depend on the rate of tax, because for individuals the 2019 rate of tax in South Africa is based on a sliding scale, with the lowest tax rate being 18 per cent of taxable income of R195 850 and the highest is 45 per cent of taxable income over R1 500 000.⁴³

Residents employed in a tax paying foreign jurisdiction would generally apply the provisions of section 6*quat* to obtain relief from double taxation. Section 6*quat*(1) provides a unilateral tax credit⁴⁴, referred to as a rebate, in respect of foreign taxes on income. The rebate is deducted from the normal tax payable of a resident in whose taxable income there is included specific categories of income, such as any income (other than a foreign dividend) received or accrued to such resident from any source outside South Africa which is not deemed to be a source within South Africa.⁴⁵

In terms section 6*quat*(1A), the rebate may only be claimed to the extent that the relevant income in terms of section 6*quat*(1) is included in taxable income and normal tax becomes payable. Therefore, in terms of the proposed section 10(1)(o)(ii) amendment, the qualifying remuneration over R1m could potentially result in a South African normal tax liability and therefore the resident would be able to obtain a rebate in terms of section 6*quat*. Section 6*quat*(1A) provides that the rebate will be an amount equal to the sum of any taxes on income proved to be payable to any sphere of government of any country other than South Africa.

Section 6*quat*(1B) provides that the rebate shall not in aggregate exceed an amount which bears to the total normal tax payable the same ratio as the total taxable income attributable to the specific category of income in respect of which the rebate may be claimed, bears to the total taxable income. The

⁴² Explanatory Memorandum on the Taxation Laws Amendment Bill, 2017, 15 December 2017, point 1.2, page 8, available at <http://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2017-01%20-%20Explanatory%20Memorandum%20on%20the%202017%20Taxation%20Laws%20Amendment%20Bill%2015%20December%202017.pdf>, accessed on 04 January 2019.

⁴³ SARS Rates of Tax for Individuals, available at <http://www.sars.gov.za/Tax-Rates/Income-Tax/Pages/Rates%20of%20Tax%20for%20Individuals.aspx>, accessed on 04 January 2019.

⁴⁴ Unilateral Relief is the granting of relief from the effects of international double taxation on the basis of domestic legislation rather than the provisions of a tax treaty.

⁴⁵ Section 6*quat* (1)(a)(i)

following formula can be used to determine the section 6quat rebate as per IN18:

$$\frac{\text{Taxable income derived from all foreign sources (A)}}{\text{Taxable income derived from all sources (B)}} \times \text{Normal tax payable on (B)}$$

If a resident cannot claim a section 6quat(1) rebate, then a section 6quat(1C) deduction can be claimed, provided the foreign income is derived from the resident carrying on a trade. Therefore, the section 6quat(1C) is not available to income derived from employment. Section 6quat(1) allows qualifying foreign sourced amounts, which are included in a resident's taxable income to potentially qualify for a foreign tax rebate. Under section 6quat(1C) a resident may claim foreign taxes, that do not qualify for the section 6quat(1) rebate, as a deduction in determining taxable income. That is, essentially, foreign taxes payable on South African-source amounts.

Residents who meet the requirements of section 6quat would be in position to reduce its normal tax liability with the rebate in respect of foreign taxes on income. A resident employed for example in the UAE would not be able to apply the provisions of section 6quat as there will be no foreign tax on income. Residents employed in jurisdictions where foreign tax is levied will be in a position to apply the provisions of section 6quat.

The below example is the practical interaction between the section 10(1)(o)(ii) exemption and section 6quat.

DETAILS	1	2
	Section 10(1)(o)(ii)	
	CURRENT	AMENDED
Foreign Income	R 1 500 000	R 1 500 000
Foreign tax (18%)	R 270 000	R 270 000
Section 10(1)(o)(ii) exemption	R 1 500 000	R 1 000 000
Taxable income	R -	R 500 000
Local tax (28%)	R -	R 280 000
Total tax (local + foreign)	R 270 000	R 550 000
Apply section 6quat	No	Yes

CHAPTER FIVE: DOUBLE TAXATION AGREEMENTS

The UAE (and many other tax-free countries) is a lucrative destination for residents to seek employment because of the excellent remuneration packages but more importantly the remuneration in the UAE earned by individuals is tax free.⁴⁶ With the proposed section 10(1)(o)(ii) amendment, only the first R1m will be tax free and the balance will be taxed according to the South African tax tables for individuals. In a foreign jurisdiction where no tax is levied like in the UAE, section 6*quat* of the IT Act will not be applicable because there is no double taxation, and therefore the resident would have to look for alternatives other than section 6*quat* to reduce its normal tax liability, such as applying the relevant Articles of a DTA in order to determine which jurisdiction has the taxing right to the income.

The Constitution⁴⁷ of South Africa is the supreme law of the Land.⁴⁸ South African law is made up of statute law, common law, international customary law and international law. A DTA is classified as an "international agreement"⁴⁹ and under section 231 of the Constitution; all international agreements are to be incorporated as part of South African law. DTA's are recognised into South African domestic law under section 108(2) of the IT Act. The result of section 108(2) of the IT Act, is that once a DTA is enacted, it has the same standing as other domestic law tax law provisions.⁵⁰

In terms of ranking, does a DTA rank lower higher or on par with domestic law? In other words, can a DTA override domestic law? One view is that the DTA takes precedence over domestic law as the DTA obligations has the same force as the Constitution.⁵¹ The Constitutional Court in *Glenister*⁵²

⁴⁶ The Official Portal of the UAE Government, Taxation, available at <https://government.ae/en/information-and-services/finance-and-investment/taxation>, accessed on 06 February 2019.

⁴⁷ Constitution of the Republic of South Africa, 1996, available at <https://www.gov.za/documents/constitution-republic-south-africa-1996>, accessed on 06 February 2019.

⁴⁸ Section 2 of the Constitution of the Republic of South Africa, 1996

⁴⁹ Section 231 of the Constitution of the Republic of South Africa, 1996

⁵⁰ AB LLC and BD Holdings LLC v Commissioner of the South African Revenue Services (13276) [2015] ZATC 2 (15 May 2015), point 5, available at <http://www.saflii.org/za/cases/ZATC/2015/2.html>, accessed on 06 February 2019.

⁵¹ Hattingh "Elimination of International Double Taxation" para 36.14.

views that DTAs create rights and obligations on a par with the Constitution, cannot be supported. The Supreme Court of Appeal in the *Tradehold* case viewed that a DTA modifies the domestic law and will apply in preference to the domestic law to the extent that there is any conflict.⁵³ According to an article written by Izelle du Plessis⁵⁴, there is a different argument why a DTA could override domestic law as follows: "If one assumes that article 31 of the Vienna Convention on the Law of Treaties (the Vienna Convention),⁵⁵ which deals with the interpretation of treaties, is customary international law and therefore law in South Africa, South Africa's DTAs will have to be interpreted in accordance with that article.⁵⁶ Article 31 of the Vienna Convention requires states to interpret DTAs in such a way that double taxation is

⁵² *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC) (17 March 2011), available at <http://www.saflii.org/za/cases/ZACC/2011/6.html>, accessed on 06 February 2019.

⁵³ *Commissioner for the South African Revenue Service v Tradehold Ltd* (132/11) [2012] ZASCA 61; [2012] 3 All SA 15 (SCA); 2013 (4) SA 184 (SCA) (8 May 2012), available at <http://www.saflii.org/za/cases/ZASCA/2012/61.html>, accessed on 06 February 2019.

⁵⁴ DU PLESSIS, Izelle. The incorporation of double taxation agreements into South African domestic law. PER [online]. 2015, vol.18, n.4 [cited 2019-02-06], pp.1188-1204. Available from: http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812015000400014&lng=en&nrm=iso. ISSN 1727-3781. <http://dx.doi.org/10.4314/pelj.v18i4.13>.

⁵⁵ Vienna Convention on the Law of Treaties (1969). Art 31 reads as follows: "General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

⁵⁶ South Africa is not a party to the Vienna Convention. In *Harksen v President of the RSA* 2000 2 SA 825 (CC) the Constitutional Court stated that the extent to which the Vienna Convention reflects customary international law is by no means settled. However, in *Glenister v President of the RSA* 2011 3 SA 347 (CC) the Constitutional Court at para 187 and fn 43 relied on a 31(3)(b) of the Vienna Convention, adding weight to the view that the Vienna Convention forms part of South African law. See Du Plessis South African Perspective on Some Critical Issues 98 for a more detailed discussion of the views regarding the status of the Vienna Convention in South African law. However, in *Krok v The Commissioner for the South African Revenue Service* (SCA) unreported case numbers 20230/2014 and 20232/2014 of 15 August 2015 para 27, the court stated that aa 31 and 32 of the Vienna Convention are customary international law and binding on South Africa.

avoided.⁵⁷ It may be argued that if the Income Tax Act imposes tax in a situation where exclusive taxing rights are awarded to the other state with which South Africa has entered into a DTA, the application of the relevant provisions of the Income Tax Act may be viewed as a form of double taxation". It is submitted that DTAs overrides over domestic law is possible because of the provisions of the Constitution and the way in which these provisions have been interpreted by the Constitutional Court, namely that ordinary domestic obligations are created when an international agreement is domesticated. It is further submitted that section 108(2) of the Income Tax Act, which provides that a gazetted DTA shall have effect as if enacted in the Income Tax Act, conforms to the Constitution in this regard.⁵⁸

Section 6quat(2) of the IT Act provides a resident with a choice of relief either under the DTA or under section 6quat. A resident may not seek relief under both the DTA and section 6quat. The choice of relief can be exercised annually by the resident and therefore a resident is not bound by the election in a previous tax year. The election is made in its entirety which means that if a resident elects the relief provided under the tax treaty, none of the provisions of section 6quat (including the additional relief measures) will apply. Where a resident does not make an election, the SARS will automatically select section 6quat as the relief mechanism on behalf of the resident to avoid double taxation.

Residents rendering services aboard in the UAE and who elects the DTA as a relief mechanism over section 6quat would therefore have to apply the provisions of the DTA⁵⁹ between South Africa and the UAE which is found in "Article 14 – income from employment"⁶⁰.

⁵⁷ OECD Tax Treaty Override 9.

⁵⁸ DU PLESSIS, Izelle. The incorporation of double taxation agreements into South African domestic law. PER [online]. 2015, vol.18, n.4 [cited 2019-02-06], pp.1188-1204. Available from: http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812015000400014&lng=en&nrm=iso. ISSN 1727-3781. <http://dx.doi.org/10.4314/pelj.v18i4.13>.

⁵⁹ DTA No. 618 dated 15 December 2016, available at <http://www.sars.gov.za/AllDocs/LegalDoclib/Agreements/LAPD-IntA-DTA-2016-04%20-%20DTA%20United%20Arab%20Emirates%20GG%2040496.pdf>, accessed on 07 February 2019.

⁶⁰ Paragraph 3 and 4 of Article 14 will not be discussed as it is outside the scope of this dissertation topic.

Paragraph 1 of Article 14 reads as follows: “Subject to the provisions of Articles 15, 17 and 18, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.”

Remuneration is not defined in the DTA between South Africa and the UAE, however under Article 3 of the Definitions, point 2 reads as follows: “As regards the application of this Agreement at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which this Agreement applies.” In other words, remuneration as per the DTA will have the same meaning as remuneration as per the relevant domestic Law of that country.

As per the “commentary on the model tax convention”⁶¹, Article 15, paragraph 1 establishes the general rule that income from employment is taxable in the State where the employment is actually exercised. Applying the commentary to residents rendering services in the UAE, it is clear that the UAE will have the taxing right because the employment was actually exercised in the UAE. The commentary further elaborates that employment is exercised in the place where the employee is physically present when performing the activities for which the employment income is paid. For residents rendering services in the UAE, their employment would be in the UAE as this is the place where they are physically present when rendering the services for which these services is paid.

Paragraph 2 of Article 14 reads as follows: “Notwithstanding the provisions of paragraph 1 of this Article, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:

⁶¹ Commentary on the Model Tax Convention, Article 15, paragraph 1, available at <http://www.oecd.org/berlin/publikationen/43324465.pdf>, accessed on 04 January 2019.

- a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned; and
- b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State; and
- c) the remuneration is not borne by a permanent establishment which the employer has in the other State.”

Paragraph 2 contains the general exception to the rule in paragraph 1 which allocates South Africa the taxing right over the UAE, provided all three conditions are met. The first condition is that the resident must not be present for more than 183 days in the UAE. The second condition is that the employer paying the remuneration must not be a resident of the UAE, in which the employment is exercised. Under the third condition, if the employer has a permanent establishment in the UAE in which the employment is exercised, the exemption is given on condition that the remuneration is not borne by that permanent establishment. If all these conditions are met then South Africa will have the taxing right to the income over the UAE.

For the UAE to have the taxing right, all three conditions in paragraph 2 must not be met, which in turns favours residents rendering services in the UAE, as the UAE is a tax-free jurisdiction for individuals. Residents must therefore ensure that they do not meet the requirements of paragraph 2 by being physically present in the UAE for more than 183 days and the employer must be resident of the UAE and the remuneration is borne through a permanent establishment in the UAE (if the resident has a permanent establishment in the UAE). In the majority of cases, only two requirements of paragraph 2 will generally be applicable to taxpayers rendering services in the UAE:

- 1) Residents must be physical present in the UAE for more than 183 days, and
- 2) The employer must be a resident of the UAE.

Once these requirements are met then the UAE will have the taxing right over the employment income. As per the official portal of the UAE

Government⁶², the UAE does not levy income tax on individuals because the rate of tax on individuals is 0%⁶³. Therefore, if a resident elects the DTA instead of section 6quat of the IT Act as a relief mechanism, and if the DTA automatically takes precedence over domestic law (Tradehold⁶⁴), and if the resident meets the requirements of Article 14 of the DTA between South Africa and the UAE, then the UAE will have the taxing right to the income of which the UAE levies a tax rate of 0% on individuals. South Africa will not have the taxing right and cannot apply its domestic law over and above the DTA, or else SARS will face income tax Objection and Appeal⁶⁵ from affected residents via the Tax Administration Act No. 28 of 2011 (hereinafter referred to as "TAA"). In the matter of *MF Fowler v HMRC* [2016] UKFTT 234 (TC), the United Kingdom (hereinafter referred to as "UK") sought to impose tax on the revenue derived by Mr Fowler, a South African resident who was employed as a qualified diver to undertake diving work on the UK Continental Shelf. The issue was whether to tax Mr Fowler under Article 14 of the DTA⁶⁶ (income from employment) or Article 7 of the DTA (business profits). The issue was that the domestic law in the UK specifically treated employment income as a "diver or diving supervisor" as business profit from carrying on of a trade and not income from employment. The Courts therefore decided that the income derived by Mr. Fowler was income from trade, to be dealt with under Article 7 of the DTA and not Article 14. In this particular case the domestic law of the UK was used as a basis to decide which article of the DTA is applicable.⁶⁷

⁶² The Official Portal of the UAE Government, UAE taxation, available at <https://government.ae/en/information-and-services/finance-and-investment/taxation>, accessed on 04 January 2019.

⁶³ UAE Tax System, available at <https://en.portal.santandertrade.com/establish-overseas/united-arab-emirates/tax-system>, accessed on 04 January 2019.

⁶⁴ Commissioner for the South African Revenue Service v Tradehold Ltd (132/11) [2012] ZASCA 61; [2012] 3 All SA 15 (SCA); 2013 (4) SA 184 (SCA) (8 May 2012), available at <http://www.saflii.org/za/cases/ZASCA/2012/61.html>, accessed on 04 February 2019.

⁶⁵ Section 104 of the TAA

⁶⁶ DTA No. 172 dated 31 January 20013, available at <http://www.sars.gov.za/AllDocs/LegalDoclib/Agreements/LAPD-IntA-DTA-2012-80%20-%20DTA%20%20United%20Kingdom%20GG%2024335.pdf>, accessed on 07 February 2019.

⁶⁷ Interpreting double tax agreements, available at https://www.saica.co.za/integritax/2016/2555.Interpreting_double_tax_agreements.htm, accessed on 07 February 2019.

In conclusion it seems as though various Courts are arriving at different decisions when it comes to concluding on the ranking of domestic law and the DTA but the decisions are based on a case-by-case basis. Care should therefore be exercised not to solely rely on the provisions of the DTA or domestic law in isolation.

CHAPTER SIX: TAX RESIDENCY

Residents employed in low tax- or tax-free jurisdiction will be negatively affected by the section 10(1)(o)(ii) amendment, specifically residents who are employed in countries such as the UAE where there is no income tax levied on an individual's employment income. As from 1 March 2020 residents could be in a normal tax liability position when applying the provisions of the section 10(1)(o)(ii) amendment. If residents wanted to reduce their normal tax liability, the provisions of section 6^{quat} of the IT Act or a DTA could be applied. Another option is for a resident to give up their South African tax residency and therefore becoming a tax resident of another country, especially another country which has a low tax- or tax-free jurisdiction.

Residents employed in the UAE would benefit from becoming a tax resident of the UAE as all individual income is free from tax as opposed to the proposed s10(1)(o)(ii) exemption where only the first R1m is free from tax.

The first step in determining the normal tax liability of any natural person in South Africa is to establish whether or not that natural person is a "resident" as defined in section 1 of the IT Act. Two tests are applicable to determine whether or not a natural person is a resident, namely –

1. The ordinarily resident test; and
2. The physical presence test.

Ordinarily resident test

A natural person will be a resident if South Africa is the permanent home to which he or she would normally return to. The Courts⁶⁸ concept of "ordinarily resident" is as follows:

- living in a place with some degree of continuity, apart from accidental or temporary absence. If it is part of a person's ordinary regular course of life to live in a particular place with a degree of permanence, he or she must be regarded as ordinarily resident;
- the place where his or her permanent place of abode is, where his or her belongings are stored, which he or she leaves for temporary

⁶⁸ Cohen v CIR [1946] 13 SATC 362 and CIR v Kuttel [1992] 54 SATC 298

absences and to which he or she regularly returns after these absences;

- a residence that is settled and certain and not temporary and casual; or
- where a person normally resides, apart from temporary or occasional absences.

Income received or accrued from a source outside of the Republic will only be subject to tax from the date the natural person becomes ordinarily resident. Therefore, natural persons employed in the UAE, if their intention is always to return to South Africa after their employment, they will be considered ordinarily resident. The effect is that all world-wide income of a natural person who is a resident is subject to normal tax, which includes the income from the UAE. Therefore, natural persons working in the UAE must ensure that the UAE is their permanent place of abode and any absences from the UAE are temporary. This will ensure that the natural person will not be ordinarily resident of South Africa and therefore cannot be subject to tax on their world-wide income. The natural person will however be subject to tax on their income from a South African source. More importantly the natural person who is not ordinarily resident will not be subject to the section 10(1)(o)(ii) amendment and none of their income will be subject to tax as the UAE does not tax individual's employment income.

Physical presence test

This concept is time-based and is only applicable to a natural person who was not at any stage during the relevant tax year ordinarily resident in South Africa. This test is based on the number of days⁶⁹ during which a natural person is physically present in the Republic.

⁶⁹ It is important to note that a day includes a part of a day. Thus both the day of arrival and departure are included in the count. This test is also known as the day test or time rule. A day is regarded to start at 00:00, therefore, a person who arrives in South Africa at 23:55 would be regarded to be present in South Africa for a full day. However, any day that a person is in transit through South Africa between two places outside South Africa and that person does not formally enter South Africa through a port of entry, or at any other place as may be permitted by the Director-General of the Department of Home Affairs or the Minister of Home Affairs, is excluded in the count.

The physical presence test is performed annually in order to determine whether the natural person is a resident for the tax year under consideration. The test consists of three requirements.

The natural person must be physically present in South Africa for period(s) exceeding:

- i. 91 days in aggregate during the tax year under consideration;
- ii. 91 days in aggregate during each of the five tax years preceding the tax year under consideration; and
- iii. 915 days in aggregate during the above five preceding tax years.

A natural person has to meet all three requirements before he or she will be regarded a resident, and will cease to be a resident if he or she is physically outside the Republic for a continuous period of at least 330 full days.

Where a natural person has given up its South African tax residency, this person would then be classified as not ordinarily resident and the natural person should be careful that they do not meet the requirements of the physical presence test as this is the only test to determine tax residency for persons who are not ordinarily resident.

Any natural person who is deemed to be exclusively a resident of another country with which South Africa has entered into an agreement for the avoidance of double taxation is excluded from the definition of “resident”. This is very important for natural persons working outside of the Republic, especially in the UAE because if the natural person becomes exclusively resident of the UAE of which South Africa has a DTA with the UAE, this natural person will be excluded as a tax resident of South Africa and their foreign income will not be taxed under South African tax law. In addition, the employment income from the UAE will be free from tax as per the government tax laws of the UAE.

Natural persons who do intend to give up their South African tax residency must formally apply hereto and must also be cognisance of the tax implications when exiting South Africa as a tax resident. Natural persons who intend to remain permanently, for example in the UAE, must formalise their immigration by following certain formalities as in terms of the exchange

control policy and apply for a “tax clearance certificate”⁷⁰ from SARS for emigration. The emigration is formalised through a local commercial bank of the natural persons choice in South Africa, by submitting the required forms and all the supporting documentation.

Cessation of residence of persons other than companies [s 9H(2)]

In terms of section 9H(2) of the IT Act, an individual that ceases to be a resident during any year of assessment must be treated as having disposed of each of that individual assets to a person that is a resident on the date immediately before the day on which that individual ceases to be a resident for an amount received or accrued equal to the market value of the asset on that date; and reacquired each of those assets on the day on which that individual ceases to be a resident at an expenditure equal to that market value.⁷¹ The practical reason why the “day before” is used as a disposal timing trigger is that the taxpayer will be a non-resident the following day after the “day before” and can only be taxed on a source basis as the South African residency tax will only apply while the taxpayer is a resident on the “day before”. In addition, the resident’s assets are within reached to be taxed as an exit charge, while still a resident on the “day before”. The individual year of assessment is deemed to end on the date immediately before the day on which the individual or trust ceases to be a resident; and commence on the day on which the individual ceases to be a resident.⁷²

Therefore, natural persons who cease to be resident will have to account for CGT on their world-wide assets excluding assets listed under section 9(H)(4) of the IT Act.

Any South African taxpayer seeking to become non-resident should take note that the paper work (such as Exchange Control form) is quite important but even more important is that, having become non-resident, such taxpayer

⁷⁰ Supporting documents for emigration, available at <http://www.sars.gov.za/ClientSegments/Individuals/TCS/Pages/Supporting-Docs-for-Emig.aspx>, accessed on 04 January 2019.

⁷¹ These rules does not apply to certain South African-source assets listed in s 9H(4) such as immovable property in South Africa.

⁷² Comprehensive Guide to Capital Gains Tax (Issue 7), Change of residence, Page 115, available at <http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-CGT-G01%20-%20Comprehensive%20Guide%20to%20Capital%20Gains%20Tax.pdf>, accessed on 04 January 2019.

should live his or her life accordingly. To become 'non-resident' and to live as if nothing has changed could have significant tax risks. Where someone is ordinarily resident is a question of fact and in answering that question SARS could well take into account the various factors considered in the UK case *Lynette Dawn Yates v HMRC* [2012] UKFTT 568 (TTC) where various factors of Ms Yates were scrutinised when she said she is no longer a resident of the UK, such as:⁷³

- She remained on the local Kingston Hall electoral role in the UK.
- Her mail came to the UK family home and was then on-sent to her in Spain.
- She kept her UK bank accounts and credit cards – furthermore, they showed substantial activity.
- She continued receiving an UK disability living allowance – she never informed the Department of Pensions of her move to Spain.
- She used her UK dentist and came to the UK for medical treatment.
- Certain personal belongings were left at the UK family home.

These factors taken into account by SARS could well place a taxpayer as ordinarily resident as on face value it would seem that Ms Yates is a resident of the UK, contrary to what she was claiming.

⁷³ Meaning of ordinarily resident, available at <https://www.saica.co.za/integritax/2013/2191. Meaning of ordinarily resident.htm>, accessed on 07 February 2019.

CHAPTER SEVEN: CONCLUSION

Residents working aboard, specifically in tax free jurisdiction will have options available to possibly reduce their South African tax liability in a number of ways when the amended section 10(1)(o)(ii) is in operation from 1 March 2020.

Residents could adopt the section 6*quat* rebate in respect of foreign taxes paid, alternatively apply the Articles of the DTA or cease to be resident. All three alternatives give some degree of reducing the South African normal tax liability.

The section 6*quat* rebate only reduces the South African normal tax liability by the foreign taxes paid as per the relevant provisions of section 6*quat*.

The DTA however allocates the taxing right of employment income to the country where the services were physically rendered. This would reduce the South African normal tax liability completely but not the foreign tax liability. If the foreign tax jurisdiction is the UAE, then no tax will be levied on individual employment income as per the laws of the UAE.

Residents could also cease to be tax resident, this is a formal process which attract CGT, commonly known as exit taxes but does not reduce the “foreign tax liability”⁷⁴.

It’s certainly not all doom and gloom for residents as there are various options available to mitigate the tax effects of the section 10(1)(o)(ii) amendment.

⁷⁴ If the foreign tax jurisdiction is the UAE, then no tax will be levied on individual employment income as per the laws of the UAE

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